

Water Policy: Planning, Process and Legal Decision

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Introduction

California and Texas: Similarity and Contrast

- Texas is a land of impatient braggarts who cherish privacy and liberty. Californians appear more patient and tolerant of extended process.
- Texas and California both have bountiful natural resources including water.
- Texas and California have the two largest state populations. Texas urbanized at a later period and at a faster rate.
- Texas and California both face acute water shortages if adequate supply/infrastructure is not developed and timely available. California faces more acute water shortages & more near term.
- Texas has minimal federal interference with water supply and allocation decisions. Other than a few national parks, Texas has almost no federal land.
- Texas constitution, statute and common law undergird relatively strong private property interests in water ... under the prior appropriation system for surface water, limited landowner riparian rights and rule of capture/absolute ownership for groundwater.
- Texas still has @ 9-12 million acre feet of unappropriated surface water; California's surface water evidently is far more fully appropriated.

Context:

- The Texas state budget has a \$10-13 billion surplus. Texas now leads the nation in job creation and gross state product. Texas is still adding jobs in the 4th quarter of 2008.
- Our housing sector has not seen the decline as in California and other states. However, Texas now begins to see slight increase in unemployment but at a sharply lower rate than most states.
- The Texas Legislature meets for six months every other year. Legislators earn \$600 per month.

Water Supply – The Value and Limits of Planning

- Texas population of 24 million is projected to double within 50 years.
- Texas Regional & State Water Planning Process: A bottoms up process driven by 16 Regional Water Planning Groups. Plans measure water currently available, usage by category, precisely estimate future demand and available supply in drought in 2060.

- The Regional Planning Groups identified 4500 water supply strategies to generate an additional nine million acre feet needed to meet demand in 2060.

A ShriII Wake-up Call

- Texas will be 85% short of demand in 2060 during a drought if existing supply is not increased by 27% or 9 million acre feet.
- Shortages of over 3 million acre feet could as early as 2010 in a severe, extended drought in the DFW metroplex.
- Major new water supply strategies developed over 8-9 years ago.

- Originally legislated priority for meeting increased demand: A “Voluntary Redistribution of Existing Supply” (e.g. irrigation rights transferred, i.e. sold in a voluntary exchange)

And the progress?

Great Texas Water Plans, cutting edge science, strong support, nationally acclaimed, used as a model for other states but...no drought.

- Little to no progress on actual implementation of major water supply strategies
- State government has little stake in project implementation, an unexpected weakness in a regionally based process.

- The state agency (Texas Water Development Board who approves the regional plans and compiles them into the State Water Plan has minimal awareness of the implementation of major water supply strategies
- Unresolved legal questions about water right administration and uncertain financing stymie project implementation: a conundrum.

A Need for Legal Clarity: Water policy and water business

- Law and rule need sufficient clarity to ground administrative and judicial decision.
- Administrative process needs predictability.
- Uncertainty, ambiguity, and indefinite delay in a state's decision making procedures complicate if not precludes the ability of water authorities, local governments and the private sector to plan, finance and implement water supply projects.

- The same instability confounds and delays water conservation and protection of environmental flows.
- Rational planning and economic decisions requires a measure of clarity and stability in the allocation of water resources.
- Legal doctrines such as the Public Trust Doctrine are inconsistent with the cornerstone of the prior appropriation system when applied retroactively to existing water rights.

How legal uncertainty has delayed cost-efficient, simple water supply projects and critical protection of environmental flows: three Texas examples

- Water Right Amendments
- Groundwater 'Management'

- Environmental Flow Policy

Assumed: adjudicated surface water rights under the prior appropriation system confer defeasible property interests. The state allocates private usufructory rights for beneficial purposes. Such rights are fungible.

Example 1: Water right amendments for change or addition of a beneficial use...no other change.

- Previously considered the simplest of authorizations.

- An application to add industrial use to a municipal right has been pending in Texas for eight years. A Supreme Court ruling added to the ambiguity of state law.
- Similar applications are stalled. More not even filed.
- Such water right amendments for change of use are fundamental to the Texas State Water Plan.
- The question: does existing law require an environmental impact analysis and thus the possibility of reducing the original right?
- Core issue: what is the scope of the property interest in the existing right?

Example 2: Texas Groundwater Law: A Three-Legged Stool

- Common Law of Landowner Rule of Capture and Absolute Ownership upheld in a century of Texas case law.
- Local Groundwater District authority to regulate pumping, well-spacing and export.
- Regional Groundwater Management Areas created and administered by the state.
- The courts are busy.
- In 2008, one Supreme Court ruling and three appellate court rulings upheld landowner's private rights and limits of local district authority.
- Multiple investments lost and groundwater marketing projects cancelled.

Example 3: Environmental Flows

- In 2001 with State Water Plan detailing major water supply needs, environmental flows emerged as major issue.
- Longstanding inter-agency disputes over freshwater inflow needs for bay and estuaries.
- Then, new water right applications for pure instream use targeting 12 million acre feet of unappropriated water.
- Agency denial of these permits. Legislature upheld agency decisions. To date, courts upheld.
- After three attempts, the Legislature passed major environmental flow law.
- But.....

Major environmental flow law to impose environmental flow standards in new water rights

- Yet, no answer to the major policy questions.
- Law provides no policy rubric for environmental flow standards: restoration, enhancement, maintenance, critical?
- Another bottoms-up, multi-layered process. Who's on first?
- No legal integration with water supply planning
- No resolution of interagency dispute about the science
- Water purveyors now willing to scrap solid science for any certainty.

Water Markets – Promise but not much Progress in Texas

- Water marketing functions only with well-defined property interests in water, legal clarity and predictable administrative decision.
- Ad hoc revisions to long-established water right administration by courts and unelected agency decision-makers precludes rational economic activity upon which effective water supply systems have heretofore relied.
- Water marketing, anticipated and supported by the Texas legislature, has not emerged in Texas...with two notable exceptions.
- Within the Edwards Aquifer Authority for groundwater and within the Rio Grande Watermaster for surface water.

- Both jurisdictions clearly define the property interests in the water rights, have clearly defined rules for transfers and are temporary/seasonal transactions. Both systems were mandated by court rulings later codified with specificity.

Clarity

- Statutory and regulatory construction aimed at clarity is critical.
- An art and a test of will
- Language intended primarily to garner consensus can eventually defeat the purpose of the law or rule making.
- Administrative process is also critical and often benefits from legislative review and amendment.

- Wise water policy decisions need the long view decades in the future.